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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

WELLS FARGO BANK, N.A., AS TRUSTEE FOR THE REGISTERED HOLDERS OF BANC OF AMERICA COMMERCIAL MORTGAGE INC., COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2004-5, Plaintiff, v. DANIEL J. ELEFANTE, an individual, and THEODORE H. TOCH, an individual, Defendants.	Case No. 2:12-cv-01521-RCJ-CWH **PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, plaintiff Wells Fargo Bank, N.A., as Trustee for the registered holders of Banc of America Commercial Mortgage Inc., Commercial Mortgage Pass-Through Certificates, Series 2004-5 ("Plaintiff" or "Trustee"), via its Special Servicer, Torchlight Loan Services LLC, requests that the Court grant summary judgment in its favor and against Daniel J. Elefante and Theodore H. Toch (collectively, "Guarantors") for breach of a personal guaranty. This Motion is made and based on the following memorandum of points and authorities, the Declaration of Daniel Greenholtz attached hereto as Exhibit 1, the attached exhibits, the papers and pleadings on file, and any oral

argument the Court may deem necessary.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case involves Trustee's enforcement of a personal guaranty for which full recourse against Guarantors was triggered when Borrower filed for bankruptcy protection. Previously, the Court granted Trustee's motion for partial summary judgment on the issue of liability, finding Guarantors breached a personal guaranty.

As will be demonstrated below, it is factually undisputed that Guarantors made no payments under the personal guaranty and Guarantors owe $4,361,958.10, as of June 1, 2013. Judgment should be entered against Guarantors in the amount of $4,361,958.10, plus Per Diem Interest in the amount of $563.78 and Per Diem Default Interest in the amount of $479.41.

Importantly, partial summary judgment has already been granted on the issue of liability (i.e., the first two elements of a breach of contract claim). Within that order, the court also dispensed with the broad brush "A.B. 273" defenses the Guarantors injected into that briefing. With those issues having been decided, there is no impediment to ruling in Trustee's favor on the element of damages.

II. STATEMENT OF UNDISPUTED FACTS

Since the Court previously concluded that Trustee is entitled to partial summary judgment on the issue of breach, the only facts relevant to the instant motion are those related to damages. The following material facts entitling Trustee to the damages requested are undisputed:

1. On April 26, 2013, the Court issued an order in this matter granting Plaintiff's Motion for Partial Summary Judgment, stating that "Plaintiff is entitled to partial summary judgment on the issue of breach." Dkt. No. 35.

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2. As of June 1, 2013, the amount due and owing under the Loan Documents[1] includes the following amounts:

a. Principal in the amount of $3,451,719.79;

b. Interest from January 1, 2012 through June 1, 2013 in the amount of $293,283.64;

c. Default Interest from July 1, 2011 through June 1, 2013 in the amount of $336,945.90;

d. Administrative Fees in the amount of $425.00;

e. Late Charges in the amount of $175,633.33;

f. Appraisal Fees in the amount of $10,250.00;

g. Property Inspections in the amount of $786.71;

h. Special Servicing Fees in the amount of $15,559.58;

i. Interest on Protective Advances in the amount of $2,492.12;

j. Interest on P&I Advances in the amount of $7,519.66; and

k. Attorneys' Fees in the amount of $366,064.85.

See Ex. 1 at ¶ 3.

3. As of June 1, 2013, the Loan accrues the following interest:

a. Per Diem Interest in the amount of $563.78 and

b. Per Diem Default Interest in the amount of $479.41.

See Ex. 1 at ¶ 4.

4. As of June 1, 2013, the Loan includes the following credits:

a. Tax Escrow in the amount of $15,595.96;

b. Insurance Escrow in the amount of $6,753.83; and

c. Unapplied Funds in the amount of $276,372.69.

See Ex. 1 at ¶ 5.

[1] All capitalized terms not defined herein have the meanings abscribed to them in the Motion for Partial Summary Judgment [Dkt. No. 26] and the Loan Documents.

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5. As of June 1, 2013, the total amount due is $4,361,958.10. See Ex. 1 at ¶ 6.

6. No payments have been made under the Guaranty. See Ex. 1 at ¶ 11.

7. Trustee does not have access to, or the ability to realize upon, the Property because of the Borrower's ongoing bankruptcy. Furthermore, due to the automatic stay of Borrower's bankruptcy, Trustee does not have possession of the Property. See In re Summit Plaza Storage Partners, LLC, No. 12-15402-btb (Bankr. D. Nev.); see also Dkt. No. 15 at Ex. G; Dkt. No. 35 at 4:10–13.

III. LEGAL ARGUMENT

A. Applicable Standard

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is material if it "might affect the outcome of the suit under the governing law," and a dispute as to a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

On a summary judgment motion, "[t]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise supported motion for summary judgment." Anderson, 477 U.S. at 256. Once the moving party has carried its burden of showing that no material fact is in dispute, "the party opposing the motion 'may not rest upon the mere allegations or denials in his pleadings, but . . . must set forth specific facts showing there is a genuine issue for trial.'" Id. at 248. A party opposing summary judgment "'must do more than simply show that there is some metaphysical doubt as to the material facts,' . . . and [it] 'may not rely on conclusory allegations or unsubstantiated speculation.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. at 249–50.

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B. Guarantors' Breach Caused Damages in the Amount of $4,361,958.10.

In Nevada, "[t]he question of the interpretation of a contract when the facts are not in dispute is a question of law." Grand Hotel Gift Shop v. Granite St. Ins., 108 Nev. 811, 839 P.2d 599, 602 (1992). "A guaranty is a contract 'like all other contracts.'" Blue Hills Office Park, LLC v. J.P. Morgan Chase Bank, 477 F. Supp. 2d 366, 380–81 (D. Mass. 2007) (citations omitted) (holding that the guarantor was liable for the full amount of the debt due to the borrower's failure to maintain its SPE status); see also CSFB 2001-CP-4 Princeton Park Corporate Center, LLC v. SB Rental I, LLC, 980 A.2d 1, 410 N.J. Super. 114 (2009) (holding that defendants were liable on a guaranty for taking out a loan encumbering the property without the plaintiff's written consent as required by the loan documents).

The elements of a breach of contract claim in Nevada are straightforward. "To prevail on a breach of contract claim, a plaintiff must demonstrate: (1) the existence of a valid contract; (2) a breach by the defendant; and (3) damages resulting from defendant's breach." Keife v. Metro. Life Ins. Co., 797 F. Supp. 2d 1072, 1076 (D. Nev. 2011) (citations omitted).

Here, the Court concluded the first two elements have been satisfied as a matter of law. See Dkt. No. 35. Damages resulting from Guarantors' breach is the only remaining issue. As demonstrated below, it is undisputed that Guarantors' breach caused damages in the amount of $4,361,958.10.

1. The Plain Language of the Guaranty and the Loan Agreement Mandates an Award of Damages in the Amount of $4,361,958.10.

"It has long been the policy in Nevada that absent some countervailing reason, contracts will be construed from the written language and enforced as written." Ellison v. Cal. State Auto. Ass'n, 106 Nev. 601, 603, 797 P.2d 975, 977 (1990) (citation omitted). "Where language in a document is clear and unambiguous on its face, the court must construe it based on this plain language." Love v. Love, 114 Nev. 572, 580, 959 P.2d 523, 529 (1998) (citation omitted). Based on the plain

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language of the Guaranty, Trustee has sustained damages in the amount of $4,361,958.10.

Pursuant to the Guaranty, Guarantors "jointly and severally guaranty the performance by Borrower of all obligations and liabilities for which Borrower is personally liable under Section 12.1 of this Agreement." See Dkt. No. 26 at Ex. 1-C. Under Section 12.1 of the Loan Agreement, "Borrower shall be personally liable to Lender for any deficiency, loss or damage suffered by Lender because of: . . . (m) the filing by Borrower or any of its members, partners, or shareholders, or the filing against Borrower, of a petition under the United States Bankruptcy Code or similar state insolvency laws . . . ." See id. at Ex. 1-B at § 12.1. According to Section 10.1 of the Loan Agreement:

> Upon the occurrence of any Event of Default described in Section 9.7 [Involuntary Bankruptcy or Other Proceeding] or 9.8 [Voluntary Petitions, Etc.], all amounts due under the Loan Documents immediately shall become due and payable, all without written notice and without presentment, demand, protest, notice of protest or dishonor, notice of intent to accelerate the maturity thereof, notice of acceleration of the maturity thereof, or any other notice of default of any kind, all of which are hereby expressly waived by Borrower . . . .

See id. at § 10.1.

First, Borrower committed several Events of Default under the Loan Documents, including, among other things, failure to pay Trustee the full amount due and unpaid under the Loan Documents when the Loan matured on July 1, 2011. See Dkt. No. 1 at ¶ 25. Guarantors admitted this allegation. See Dkt. No. 30 at ¶ 25 (admitting allegation); see also Dkt. No. 15 at Ex. J. at 3 (acknowledging and agreeing that, among other things, "the Loan is in default"). Therefore, as of July 1, 2011, the Loan was due in full. Borrower's failure to pay the Loan constituted an Event of Default. When Borrower filed a petition under Chapter 11, Title 11 of the United States Bankruptcy Code on May 4, 2012, Borrowers became personally liable, thereby triggering the Guaranty and making Guarantors jointly and severally liable

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with Borrower for the Loan that was due in full. See Dkt. No. 26. at Ex. 1 at ¶ 12; Dkt. No. 15 at Ex. G; Dkt. No. 26 at Ex. 1-B at § 12.1 ("Borrower shall be personally liable . . . because of . . . the filing by Borrower . . . of a petition under the United States Bankruptcy Code . . . ."); Dkt. No. 26 at Ex. 1-C (Guarantors "jointly and severally guaranty the performance by Borrower of all obligations and liabilities for which Borrower is personally liable . . . .").

Second, when Borrower filed a petition under Chapter 11, Title 11 of the United States Bankruptcy Code on May 4, 2012, an additional Event of Default arose. See Dkt. No. 26. at Ex. 1 at ¶ 12; Dkt. No. 26 at Ex. 1-B at § 9.7; see also Dkt. No. 15 at Ex. G. Borrower became personally liable for any deficiency, loss or damage due to Borrower's bankruptcy filing. See Dkt. No. 26 at Ex. 1-B at § 12.1. Accordingly, Guarantors became jointly and severally liable under the Guaranty. See Dkt. No. 26 at 1-C. Even if the Loan were not already due in full, all amounts due under the Loan Documents immediately became due and payable. See Dkt. No. 26 at Ex. 1-B at § 10.1. Therefore, when Borrower filed its bankruptcy petition, Borrower became personally liable for all amounts due under the Loan Documents and Guarantors became jointly and severally liable with Borrower. See id. at § 12.1; Dkt. No. 26 at Ex. 1-C.

Finally, Guarantors expressly:

> waive[d] all rights and defenses of sureties, guarantors, accommodation parties and/or co-makers and agree[d] that its obligation under [the Guaranty] shall be primary, absolute and unconditional, and that its obligations under [the Guaranty] shall be unaffected by any of such rights or defenses, including: . . . (c) the existence of any collateral or other security for the Loan, and any requirement that Lender pursue any of such collateral or other security, or pursue any remedies it may have against Borrower and/or any other Joinder Party . . . (h) any voluntary or involuntary bankruptcy, receivership, insolvency, reorganization or similar proceeding affecting Borrower or any of its assets.

See Dkt. No. 26 at Ex. 1-C. Simply stated, Guarantors expressly waived any defenses relating to the existence of any collateral or any voluntary bankruptcy

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proceedings. See also 38A C.J.S. Guaranty § 124 (2013) ("[A] guarantor cannot rely on an independent cause of action existing in favor of the principal against the creditor as a defense, and the guarantor cannot assert as a defense matters affecting the liability of the principal which are personal to the principal, such as . . . the principal's infancy, *bankruptcy*, incapacity." (emphasis added)). Therefore, Guarantors are obligated under their "guaranty of full and complete payment and performance" in the amount of $4,361,958.10. See Ellison, 797 P.2d at 977; Love, 959 P.2d at 529.

2. Nevada Assembly Bill 273 ("A.B. 273") is Inapplicable.

While Guarantors will likely argue that they are entitled to an evidentiary hearing pursuant to NRS 40.495(4) before this Court awards damages, Guarantors' argument will fail because A.B. 273 does not apply for the following two reasons.

a. A.B. 273 is preempted by federal law.

First, A.B. 273 is inapplicable to this case. Here, the Loan is a securitized loan and federal law governs securitization.

> Federal law preempts state law in three circumstances:
>
> Congress can define explicitly the extent to which its enactments pre-empt state law . . . . Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. . . . Finally, state law is preempted to the extent that it actually conflicts with federal law.

See Gonzalez v. Arrow Fin. Servs., LLC, 660 F.3d 1055, 1067 (9th Cir. 2011) (citation omitted). The regulation of the securitization of loans is occupied exclusively by the federal government, as demonstrated by Congress' heavy regulation.[2] Thus, the

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[2] As recognized by numerous courts, a defendant bank does not invalidate its ability to enforce the terms of a deed of trust if the loan is assigned to a trust pool or Real Estate Mortgage Investment Conduit ("REMIC"). See, e.g., Wadhwa v. Aurora Loan Servs., LLC, No. S-11-1784 KJM KJN, 2011 U.S. Dist. LEXIS 73949, 2011 WL 2681483, at *4 (E.D. Cal. July 8, 2011) (not reported in F. Supp. 2d) (rejecting argument that 'assignment of the note to a [REMIC] renders any interest in the property other than plaintiffs' somehow (continued...)

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regulation of REMIC trusts is a filed in which Congress intends the federal government to occupy exclusively.

Furthermore, Congress has regulated National Banks pursuant to the National Bank Act ("NBA"). Aguayo v. U.S. Bank, 653 F.3d 912, 917 (9th Cir. 2011) ("The NBA, as the ultimate statutory authority for national banks, was originally enacted in 1864 to give banks broad authority to exercise 'all such incidental powers as shall be necessary to carry on the business of banking.'"). "[B]ecause there has been a 'history of significant federal presence' in national banking, the presumption against preemption of state law is inapplicable.'" Id. (citing Bank of Am. v. City & Cnty. of San Francisco, 309 F.3d 551, 558–59 (9th Cir. 2002)); see also Barnett Bank, N.A. v. Nelson, 517 U.S. 25, 33 (1996). Thus, any state law that interferes with this legislation is preempted. Waite v. Dowley, 94 U.S. 527, 533 (1877) ("Where there exists a concurrent right of legislation in the States and in Congress, and the latter has exercised its power, there remains in the States no authority to legislate on the same matter.").

"Under its delegated powers, the OCC has promulgated regulations specifically directed toward identifying which state laws affecting national banks are preempted." Aguayo, 653 F.3d at 919 (citing OCC, Preemption Final Rule, 69 Fed. Reg. 1916 (2004); 23 OCC Q.J. 28 (Mar. 2004), 2004 WL 2360325). The NBA

(...continued)

> invalid'); Hafiz v. Greenpoint Mortgage Funding, Inc., 652 F. Supp. 2d 1039, 1043 (N.D. Cal. 2009) (argument that 'all defendants lost their power of sale pursuant to the deed of trust when the original promissory note was assigned to a trust pool' is 'both unsupported and incorrect'); The alleged 'securitization of a loan does not in fact alter or affect the legal beneficiary's standing to enforce the deed of trust.' Reyes v. GMAC Mortgage LLC, No. 2:11-CV-0100 JCM (RJJ), 2011 U.S. Dist. LEXIS 40953, 2011 WL 1322775, at *2 (D. Nev. Apr. 5, 2011). 'Securitization merely creates a separate contract, distinct from [p]laintiffs[']' debt obligations under the note, and does not change the relationship of the parties in any way.' Reyes, 2011 U.S. Dist. LEXIS 40953, 2011 WL 1322775, at *3 (citation omitted).

Christiansen v. Wells Fargo Bank, No. C 12-02526 DMR, 2012 U.S. Dist. LEXIS 142070, *9–11 (N.D. Cal. Oct. 1, 2012).

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specifically provides that "state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized real estate lending powers do not apply to national banks." See 12 CFR 34.4(a). The NBA goes on to state that "a national bank may make real estate loans under 12 U.S.C. 371 and § 34.3, without regard to state law limitations concerning . . . '[p]rocessing, origination, servicing, sale or purchase of, or investment or participation in mortgages . . . ." See id. at 34.4(a)(10). This language is identical to the preemption language in the Home Owner's Loan Act ("HOLA") regulation which has been applied by numerous courts to prohibit state regulation which interferes with REMIC trusts, like we have here. See Sami v. Wells Fargo Bank, No. C 12-00108 DMR, 2012 U.S. Dist. LEXIS 38466, *13 (N.D. Cal. Mar. 21, 2012) ("As already recognized by numerous courts, a defendant bank does not invalidate its ability to enforce the terms of a deed of trust if the loan is assigned to a trust pool or Real Estate Investment Conduit ("REMIC")."); see also Hague v. Wells Fargo Bank, No. C 11-02366 THE, 2012 U.S. Dist. LEXIS 41013 (N.D. Cal. Mar. 26, 2012) (holding that the securitization of the mortgage falls squarely within 12 C.F.R. 560.2(b)(10)'s specific preemption of state claims that deal with investment in mortgages).

The state law at issue, A.B. 273, conflicts with federal law that allows for the securitization of loans because the state law decreases the enforcement value of a loan to zero when the loan passes from the originating lender to the trustee of a loan pool. A similar interference by state law occurs each time the loan is assigned to a new trustee for nominal consideration in the ordinary course of administering securitized loans. This is a significant impairment to, and in fact, an invalidation of Holder's ability to enforce the loan. This necessarily and negatively impacts a loan pool, the health of which is a fundamental aspect behind securitization. At least as to securitized loans, A.B. 273 limits a national bank's ability, in its role as a Trustee of a securitized loan pool, to sell, purchase, invest, or participate in securitized loans secured by real property. Thus, the NBA preempts A.B. 273. See 12 CFR

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34.4(a)(10).

Here, Wells Fargo Bank. N.A., as Trustee, is a National Bank, and A.B. 273 intereferes with its rights under federal law. Accordingly, A.B. 273 is preempted and inapplicable in this case. Martinez v. Wells Fargo Home Mortg., Inc., 598 F.3d 549, 557 (9th Cir. 2010) ("[T]he types and features of state laws specifically enumerated in 12 C.F.R. § 34.4 interfere with the ability of national banks to operate under uniform federal standards, and are thus preempted.") (citing OCC Interpretive Letter No. 1005, 2004 WL 3465750 (June 10, 2004)); see also Rose v. Chase Bank USA, N.A., 513 F.3d 1032 (9th Cir. 2008).

b. A.B. 273 does not apply retroactively.

"In Nevada, as in other jurisdictions, statutes operate prospectively, unless the Legislature clearly manifests an intent to apply the statute retroactively, or it clearly, strongly, and imperatively appears from the act itself that the Legislature's intent cannot be implemented in any other fashion." Pub. Employees' Benefits Program v. Las Vegas Metro. Police Dep't, 124 Nev. 138, 154, 179 P.3d 542, 553 (2008) (internal quotations and citations omitted). "When the Legislature intends retroactive application, it is capable of stating so clearly." Id. While Section 7 of A.B. 273 states that Section 5.5 of the bill "become[s] effective upon passage and approval," this statement falls far short of a clear manifestation of intent that the amendments to NRS 40.495 contained in Section 5.5 were intended to apply retroactively. Moreover, the Legislative history of A.B. 273 demonstrates that the Legislature did not intend A.B. 273 to apply retroactively.

> Assemblyman Segerblom: Is this bill retroactive?
>
> Assemblyman Conklin: No, it is not. You would be reaching back into contracts that were made under certain circumstances. If that were done, who would ever want to sign a contract or do business in a state that would nullify contracts? . . . To retroactively pass laws would set a remarkably dangerous precedent for individuals and businesses that enter into contracts because you will wonder how it can be enforced or how it can change. . . .

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See Minutes of the Meeting of the Assembly Committee on Commerce and Labor Seventy-Sixth Session dated March 23, 2011 at p. 7, attached hereto as Ex. 2. The Legislature goes on to state "I wish we could do something in retrospect, but the consequences would be dire." See id. at p. 8. The Loan Documents were entered into on June 1, 2004. See Dkt. No. 26 at Exs. 1-B & 1-C. Since the statute does not apply retroactively to this case, Guarantors are not entitled to an evidentiary hearing regarding the fair market value of the property, which was amended by A.B. 273. See A.B. 273 at § 5.5.

3. Borrower's Bankruptcy Proceedings Do Not Entitle Guarantors to a Setoff.

Since Borrower filed a bankruptcy petition, Guarantors will likely argue that they should be entitled to a setoff from the outcome of the bankruptcy proceedings. Specifically, Guarantors may repeat their argument that Plaintiff may recover the full value of the Loan. See Dkt. No. 15 at 8:19–20.[3] Any such argument by Guarantors should be rejected.

First, as stated above, Guarantors expressly agreed that their obligations will be unaffected by "any voluntary or involuntary bankruptcy, receivership, insolvency, reorganization or similar proceedings affecting Borrower or any of its assets." See Dkt. No. 26 at Ex. 1-C. Accordingly, the Court should disregard any argument that Guarantors are entitled to an offset from the outcome of Borrower's bankruptcy proceedings because the Guaranty plainly contradicts such an argument. See id.; see also Ellison, 797 P.2d at 977 ("[C]ontracts will be construed from the written language and enforced as written."); Love, 959 P.2d at 529 ("Where language in a document is clear and unambiguous on its face, the court must construe it based on this plain language.").

[3] Citation refers to page number and line number. For example, "8:19" refers to page number 8 and line number 19.

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Second, in this case, Guarantors cannot escape their obligations under the Guaranty by arguing that Plaintiff may recover the full value of the Loan through Borrower's bankruptcy action. Here, Guarantors "jointly and severally guaranty the performance by Borrower of all obligations and liabilities for which Borrower is personally liable." See Dkt. No. 26 at Ex. 1-C. Upon Borrower's filing of a petition under the United States Bankruptcy Code, Borrower became personally liable to Lender for any deficiency, loss or damage. See id. at Ex. 1-B at § 12.1. Since Borrower's filing of a bankruptcy petition constitutes an Event of Default, "all amounts due under the Loan Documents immediately shall become due and payable."[4] See id. at § 10.1. Moreover, as of the Maturity Date of July 1, 2011, the Loan was required to be paid in full, and that same amount then became recourse to Guarantors upon Borrower's bankruptcy filing. Guarantors admitted that that Borrower failed to cure. See Dkt. No. 30 at ¶ 25; Dkt. No. 15 at Ex. J. at 3. Consequently, Trustee is entitled to "all outstanding principal, accrued and unpaid interest, default interest, late charges, and any and all other amounts due under the Loan Documents." See Dkt. No. 15 at Ex. C at § 2.3(b).

Since Guarantors have not made any payments under the Guaranty, this Court should award Plaintiff all amounts due and payable under the Loan Documents. This result makes perfect sense given that one of the purposes of the Guaranty was to protect Plaintiff in event of Borrower's bankruptcy. See 38A C.J.S. Guaranty § 111 (2013) ("Bankruptcy proceedings against the principal debtor do not affect the guarantor's obligations under the guaranty."); see also In re Harvey Cole Co., Inc., 2 B.R. 517, 520 (Bankr. W.D. Wash. 1980) ("The purpose of a guaranty is to provide a source of alternative assets to the extent the bankrupt or debtor has none."). A guaranty triggered by a bankruptcy would be worthless if the Court finds

[4] Including as to Guarantors because there was already a maturity default that obligated Borrower to pay the full amount due.

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otherwise. See JPMorgan Chase Bank, N.A. v. Meritage Homes Corp., No. 2:11-cv-01364-PMP-RJJ, 2012 U.S. Dist. LEXIS 125549, at *52 (D. Nev. Sept. 4, 2012) (rejecting guarantor's argument that there are no damages and noting guarantor's argument "would undermine the very purpose of the [guaranty], which was triggered only upon [borrower's] bankruptcy"); see also In re Extended Stay Inc., 418 B.R. 49, 58 (Bankr. S.D.N.Y. 2009) (noting that Bank of America's breach of contract claim against guarantors are independent of any claims Bank of America may have against bankruptcy debtors and that guarantors have no right of offset or indemnity against bankruptcy debtors); United States ex rel. Chemetron Corp. v. George A. Fuller Co., 250 F. Supp. 649, 656 (D. Mont. 1965) (noting that bankruptcy court does not have the power "to affect the independent contract of guaranty" and that sureties were not discharged of their obligation).

4. Any Possible Double Recovery Will Be Prevented.

Guarantors may argue that a finding of damages in any amount will lead to double recovery for the Trustee. Such concerns would be misplaced. The Nevada statutes permit a creditor (i.e., Trustee) to proceed to judgment and full satisfaction of that judgment before the Property is sold. Pursuant to NRS 40.475, if the indebtedness owed to Trustee is fully satisfied by guarantors, the guarantors "step into the shoes" of Trustee with regard to the Loan and the guarantors would realize the proceeds of a subsequent trustee's sale of the Property. See NRS 40.475. In other words, if the Court awards damages in favor of Trustee in the amount of $4,361,958.10 and Guarantors satisfy the judgment before a trustee's sale, Guarantors step into the shoes of Trustee and would receive proceeds from a subsequent trustee's sale of the Property. Alternatively, if the indebtedness owed to Trustee is partially satisfied through a judgment against guarantors, the guarantors will have an interest in the Property to the extent of the proceeds of the trustee's sale exceed what remains owed to Trustee. See NRS 40.485. In accordance with these statutes and in either case, Trustee will not obtain a double recovery.

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Furthermore, any possible double recovery will be prevented because Nevada statutes permit a judgment debtor to file an affidavit refusing to satisfy a judgment. See NRS 21.280. Then, the court may require the judgment debtor to appear and explain its refusal to satisfy a judgment. See id. In other words, if the Court were to award damages in favor of Trustee and Trustee executes on the judgment, Guarantors may file an affidavit refusing to satisfy the judgment. If applicable, Guarantors can affirm that satisfaction of the judgment would constitute double recovery, which a court would ultimately decide. Therefore, any concerns of a possible double recovery should be dispelled based on the Nevada statutes.

5. Awarding Judgment to Trustee Will Benefit Borrower's Bankruptcy Estate.

One reason for having a personal guaranty that is triggered upon a borrower's bankruptcy is to assure that the lender has an alternative source of payment. R.I.D.C. Indus. Dev. Fund v. Snyder, 539 F.2d 487, 491 (5th Cir. 1976) ("One of the primary purposes for obtaining a guarantor to a note is to provide an alternative source of repayment in the event that the principal obligor's debt is discharged in bankruptcy." (citation omitted)); see also McDonald v. Alexander, 121 Nev. 812, 820, 123 P.3d 748, 753 (2005) (noting that the purpose of a guaranty contract is to make the guarantor obligated in the event that the principal debtor is unable to meet the underlying obligation and the collateral proves insufficient to satisfy the debt); Restatement (Third) of Suretyship and Guaranty § 34 cmt. a–b (1996) ("The purpose of the secondary obligation is to stand behind the obligation of the principal obligor to perform the underlying obligation, thereby assuring the obligee of the performance to which it is entitled. . . . [T]here are two possible defenses of the principal obligor—discharge in insolvency proceedings and lack of capacity—against which the secondary obligation is designed to protect. . . . [T]hese defenses may not be raised by the secondary obligor. . . . A secondary obligation protects against the inability or unwillingness of the principal obligor to perform the underlying obligation.").

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One of the purposes of the bankruptcy code is to maximize the value of the bankruptcy estate. See Toibb v. Radloff, 501 U.S. 157, 163 (1991) ("Chapter 11 also embodies the general Code policy of maximizing the value of the bankruptcy estate." (citation omitted)). If the Court entered judgment in favor of Trustee and Trustee can recover from Guarantors, any amount recovered will lower the amount the bankrupt Borrower owes, thus freeing up its money for other creditors—in essence, maximizing the value of the bankruptcy estate. Accordingly, the Court should enter judgment in favor of Trustee.

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IV. CONCLUSION

Since the Court found Guarantors liable, the only remaining issue is damages. As demonstrated above, Borrower committed an Event of Default when it failed to pay Trustee the full amount due and unpaid under the Loan Documents when the Loan matured on July 1, 2011. When Borrower subsequently filed its voluntary bankruptcy petition, Borrower became personally liable, which triggered the Guaranty, and Guarantors became jointly and severally liable with Borrower for the Loan that was due in full.

Additionally, when Borrower filed its voluntary bankruptcy petition, Borrower became personally liable for any deficiency, loss or damage due to its bankruptcy petition. Even if the Loan were not already due in full, all amounts due under the Loan Documents immediately became due and payable, which Guarantors are jointly and severally liable under the Guaranty.

Guarantors made no payments under the Guaranty. Based on the foregoing, Trustee requests that the Court issue summary judgment against Guarantors in the undisputed amount of $4,361,958.10, plus Per Diem Interest in the amount of $563.78 and Per Diem Default Interest in the amount of $479.41.

Dated: June 21, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that, on the 21st day of June 2013 and pursuant to Fed. R. Civ. P. 5(b), I served via CM/ECF and/or deposited for mailing in the U.S. Mail a true and correct copy of the foregoing **Plaintiff's Motion for Summary Judgment**, postage prepaid and addressed to the following:

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